(7)

Supreme Court, U.S.
FILED
NOV 9 1995
OFFICE OF THE CLERK

Nos. 94-1614, 94-1631, 94-1985 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,

Petitioners,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

DON G. HOLLADAY
Counsel of Record
SHELIA D. TIMS
ANDREWS DAVIS LEGG BIXLER
MILSTEIN & PRICE
500 West Main
Oklahoma City, OK 73102
(405) 272-9241
Attorneys for Petitioner,
State of Oklahoma

November 9, 1995

RECEIVED
SUPREME COURT, U.S.
CLERK'S OFFICE
NOV 9
10:49

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

1. Whether the decision of the Secretary of Commerce not to statistically adjust the 1990 census is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

2. Whether the opinion of the Court of Appeals is inconsistent with *United States Dept. of Commerce v. Montana*, 503 U.S. 442 (1992), and *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and in conflict with *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994).

3. Whether the Court of Appeals erred in imposing upon the Secretary of Commerce the heightened burden of showing that the decision furthers a governmental objective that is legitimate and is essential for the achievement of that objective.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education.

Petitioners, intervenor-defendants below, are: State of Oklahoma; State of Wisconsin.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis

Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools.

Additional respondent, defendant below, is: Donnald K. Anderson, As Clerk of the United States House of Representatives.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. 13 U.S.C. § 195 PROHIBITS THE STATISTICAL ADJUSTMENT OF THE DECENNIAL CENSUS FOR APPORTIONMENT PURPOSES 7

A. The Constitution Gives Congress The Power To Decide The Census Method; Congress Used This Power To Prohibit Adjustment 8

B. The Statutory Text Is Clear; Adjustment Is Prohibited 10

C. The Legislative History Supports The Conclusion That § 195 Prohibits Adjustment 13

Page

II. CONGRESS' LEGISLATIVE DECISION REQUIRES JUDICIAL DEFERENCE, FURTHERS THE IMPORTANT GOALS OF POLITICAL STABILITY AND PUBLIC CONFIDENCE AND INVOKES NO JUSTICIABLE STANDARDS 18

A. The Statutory Prohibition Against A Census Adjustment Commands Deference From The Judiciary 18

B. Congress' Prohibition Against Census Adjustment Furthers Political Stability And Public Confidence 20

C. No Justiciable Standards Exist For Reviewing The Census 24

III. CENSUS ADJUSTMENT IS NOT REQUIRED BY EITHER THE CONSTITUTION OR THE GOAL OF VOTER EQUALITY 28

IV. THE FINAL RESULT REACHED BY THE SIXTH AND SEVENTH CIRCUITS IS CORRECT 30

V. THE COURT OF APPEALS ERRED WHEN IT IMPOSED A STANDARD OF REVIEW OTHER THAN ARBITRARY AND CAPRICIOUS . . . 31

CONCLUSION 35

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Baker v. Carr, 369 U.S. 186 (1962)	25, 33
Baldridge v. Shapiro, 455 U.S. 345 (1982)	25
Berman v. Parker, 348 U.S. 26 (1954)	19
Carey v. Klutznick, 508 F. Supp. 404 (S.D.N.Y. 1980)	11
City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994)	4, 6, 21, 30, 31
City of New York v. United States Dept. of Commerce, 739 F. Supp. 761 (E.D.N.Y. 1990)	11
City of New York v. United States Dept. of Commerce, 822 F. Supp. 906 (E.D.N.Y. 1993)	4, 21, 26, 29, 32
City of New York v. United States Dept. of Commerce, 34 F.3d 1114 (2nd Cir. 1994)	4, 7, 11, 12, 21, 33, 34
City of Philadelphia v. Klutznick, 503 F. Supp. 663 (E.D. Pa. 1980)	11
Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992)	12
Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	10
Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992)	10
Franklin v. Massachusetts, 112 S. Ct. 2767 (1992)	16
Fullilove v. Klutznick, 448 U.S. 448 (1980)	20
Gilligan v. Morgan, 413 U.S. 1 (1973)	24
Graham v. John Deere Co., 383 U.S. 1 (1966)	19
Karcher v. Daggett, 462 U.S. 725 (1983)	28
Kinsella v. United States, 361 U.S. 234 (1960)	19

Negonsott v. Samuels, 113 S. Ct. 1119 (1993) 10
Nixon v. United States, 113 S. Ct. 732 (1993) 24
Reynolds v. Sims, 377 U.S. 533 (1964) 33
Rubin v. United States, 449 U.S. 424 (1981) 12
S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) 10
Tucker v. United States Dept. of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992) 4, 6, 21, 26, 30, 31, 34-35
United States Dept. of Commerce v. Montana, 112 S.Ct. 1415 (1992) 19, 24, 25, 28
Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) . . . 33
Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 20
Washington v. Davis, 426 U.S. 229 (1976) 33
Wesberry v. Sanders, 376 U.S. 1 (1964) 28, 33
Young v. Klutznick, 497 F. Supp. 1318 (E.D. Mich. 1980), rev'd on other grounds, 642 F.2d 617 (6th Cir. 1981) 11, 12

Constitution and Statutes:

U.S. Const.:
Art. I, § 2, cl. 3 8
Art. I, § 8, cl. 18 19

Okla. Const.:
art. V, § 11A 23

2 U.S.C. § 2a(a) 22
2 U.S.C. § 2a(b) 22

5 U.S.C. § 706 . . . . . 4, 31-32

13 U.S.C. § 141 9
13 U.S.C. § 141(b) 22
13 U.S.C. § 141(f) 9
13 U.S.C. § 141(g) 9
13 U.S.C. § 195 . . . . . 9, 12, 13, 19

Other Authorities:

56 Fed. Reg. 33582 (July 22, 1991) 3

Hearing, H.R. 7911, 85th Cong., 1st Sess.
(June 19, 1957) 14

U.S. Cong. House Comm. on Post Office
and Civil Service. Revision of Census Law.
Report to Accompany H.R. 7911.
H.R. Rep. No. 1043, 85th Cong.,
1st Sess. Washington, U.S. Govt.
Print. Off., 1957 13-14

Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of The Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess. (Comm. Print 1980) 14, 17

S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706 15

S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463 . . . . . 16, 17

S. 3063, 96th Cong., 2d Sess. (1980), 112 Cong. Rec. at S. 22,856 (daily ed. Aug. 25, 1980) 17

Holmes, *The Theory of Legal Interpretation*, 12 Harv.L.Rev. 417 (1899) 11

No. 94-1614, No. 94-1631, No. 94-1985 (Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

v.

CITY OF NEW YORK, et al.,

Respondents.

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, et al.,

Respondents.

UNITED STATES DEPT. OF COMMERCE, et al.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") is reported at 34 F.3d 1114 (2nd Cir. 1994). Pet. App. 1.[1] The opinions of the United States District Court for the Eastern District of New York are reported at 822 F. Supp. 906 (E.D.N.Y. 1993), 739 F. Supp. 761 (E.D.N.Y. 1990), and 713 F. Supp. 48 (E.D.N.Y. 1989). Pet. App. 46, 104 and 130, respectively. The decision of the Secretary of Commerce is published at 56 Fed.Reg. 33582 (July 22, 1991). Pet. App. 146.

JURISDICTION

This case is before the Court by writ of certiorari granted September 27, 1995, to review the judgment of the United States Court of Appeals for the Second Circuit. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, clauses 1 and 3, and Section 8, clause 18, of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. § 2a; and 13 U.S.C. §§ 141(a) and (b) and 195 are reproduced at App., *infra* 1a-6a.

---

[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1631.

STATEMENT OF THE CASE

On November 3, 1988, the City and State of New York, the State of California, and several other cities, public interest groups and individuals brought this suit to compel the Department of Commerce and the Bureau of the Census to require a statistical adjustment of the 1990 decennial census count in order to reduce the anticipated undercount of the population.

Pursuant to a stipulation in the litigation, the Secretary of Commerce (the "Secretary") agreed to consider the question of whether the census headcount should be statistically adjusted.[2] Pursuant to the court-approved stipulation, the Secretary published a set of Guidelines for evaluating the adjustment question. One of those, Guideline Five, required the Secretary to decide whether any adjustment of the 1990 census would violate the United States Constitution or federal statutes. While he acknowledged unsettled judicial opinion as to whether adjustment violates 13 U.S.C. § 195, the Secretary stated in the commentary which accompanied his final decision: "the majority of courts considering the issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate [citations omitted]." 56 Fed. Reg. 33582, 33606, Pet. App. 254, 257.

The Secretary concluded that whether a chosen method of adjustment would violate the Constitution and federal statutes depends upon whether accuracy of the census is improved. Because he found other compelling reasons not to adjust, "legal considerations did not provide a basis for [his] decision." 56 Fed. Reg. at 33606, Pet. App. 258.

---

[2] Oklahoma was not a party to the stipulation.

In 1991, the Secretary decided not to substitute adjusted numbers for those numbers reported by President Bush for apportionment of Congress and which were then used by the States, including Oklahoma, in redistricting. The Secretary's decision was consistent with two hundred years of adherence to a census based upon actual enumeration.

On April 13, 1993, the Secretary's decision not to adjust the census enumeration was upheld by the district court on the basis of the administrative record and the additional evidence presented at a lengthy trial. *See City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993). The district court, applying an "arbitrary and capricious" standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), determined that the Secretary's decision was reasonable.

On August 8, 1994, a divided panel of the Second Circuit reversed and remanded to determine whether the decision not to adjust was necessary to the achievement of a legitimate governmental purpose. *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114 (2nd Cir. 1994). The Second Circuit concluded that § 195's prohibition against census adjustment for apportionment purposes, when read with § 141, actually encourages adjustment. *Id.* at 1125. The court also found that an adjusted census would be more accurate for "most purposes" and thus the Secretary's rejection of adjustment should be subject to heightened scrutiny. *Id.* at 1131. The late Judge Timbers dissented from the opinion. *Id.* at 1131-1132. He recognized that the majority's decision conflicted with two other circuit decisions, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d

1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), which had earlier upheld the Secretary's decision to not adjust the census.

SUMMARY OF ARGUMENT

The Census clause of the Constitution states that the decennial census shall be taken "in such Manner as [Congress] shall by Law direct." Congress exercised this power and enacted the Census Act which directs the manner in which the census is taken. Congress allows statistical sampling to be utilized for some census purposes but it expressly prohibits the use of sampling for the count used in the apportionment of Representatives. Thus, although the Secretary did not base his adjustment decision on the express prohibition of § 195, this legislative directive bars statistical adjustment until such time as Congress determines otherwise.

The decision of the Secretary of Commerce not to adjust the 1990 census complies with Congress' directive. It is consistent with the clear language of the statute, with its legislative history, the Constitution, and with the two hundred year tradition of following a method of actual enumeration.

Congress' decision not to adjust commands deference from the judiciary. The business of census taking is clearly committed to Congress, not the courts. Congress has the power to enact any legislation "necessary and proper" to carry out its duties. Congress has done so and its policy choice must be respected. If the standard of "actual enumeration" is ever to be definitionally and fundamentally changed, it must occur through Congress and not through any other branch of government. Judicial review must

accord great deference to the broad mandate given to Congress and the two hundred year history of conducting a census based upon an actual count of the people. The sole inquiry is whether the decision not to make a statistical adjustment to the actual enumeration is consistent with the text and authorization of the Constitution.

The constitutional role of the census is to resolve the struggle for political power -- not create a method for seizing political power. If post-enumeration adjustments can be made to the actual headcount, then the door has been opened for adjustments motivated by partisan interest.

Congress' prohibition against census adjustment also guards against politicizing the constitutional role of the census and furthers political stability at both the national and state levels. The census is the key to the reorganization of the legislative branch. The census must be available within the timetable imposed by law in order for the legislature to determine its own composition and continue the business of government without a delay or a break. If census adjustment and the selection of a formula become the subject of litigation, then timing is lost and the process falters.

Neither the Constitution nor the statutes address adjustment formulas. There are no legal guidelines which a court could apply to census methodology to determine which formula is the "best" or the one required by law. The concept of voter equality also fails to give guidance. The goal of equal representation does not tell a court how to determine what census methodology.

The Second Circuit's ruling also conflicts with the decisions of the Sixth and Seventh Circuits, *City of Detroit*, 4 F.3d at 1378 and *Tucker*, 958 F.2d at 1419. The latter

correctly concluded that disagreement with census methods does not create a constitutional claim.

Although Oklahoma contends otherwise, if the Court concludes that adjustment is a permissible choice under the law and then focuses on the Secretary's decision not to adjust, it is clear that his decision is nonetheless not subject to the heightened scrutiny imposed by the Second Circuit. Heightened scrutiny is not applicable because no constitutional rights were violated by the decision not to adjust. There is no constitutional right to census accuracy. The fact that the census undercount disproportionately affects minorities does not justify a higher standard of review. There is no allegation that the census was conducted in a manner to purposefully or intentionally undercount minorities. The district court properly reviewed the Secretary's decision under an arbitrary and capricious standard.

ARGUMENT

I.

13 U.S.C. § 195 PROHIBITS THE STATISTICAL ADJUSTMENT OF THE DECENNIAL CENSUS FOR APPORTIONMENT PURPOSES.

The narrow issue before this Court is whether the Court of Appeals for the Second Circuit correctly held that the Secretary must prove that his decision not to statistically adjust the 1990 census furthers a legitimate governmental objective and his decision is essential for achievement of that objective. *City of New York*, 34 F. 3d at 1131. This narrow issue, however, triggers the broader question: what do the

Constitution and statutes direct with respect to census adjustment? In this case, the Secretary's decision not to adjust was constitutionally permissible and statutorily required. A decision in favor of adjustment would have been contrary to the governing legislative mandate.

A. The Constitution Gives Congress The Power To Decide The Census Method; Congress Used This Power To Prohibit Adjustment.

The Constitution imposes two requirements on the census. It has to be taken every ten years and it must be taken in the manner specified by Congress:

> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. Art. I, § 2, cl. 3.

Congress exercised the power granted to it by the Constitution and passed the Census Act. Within the Census Act, Congress decided that when a census is used to apportion Representatives,[3] the Secretary cannot use sampling to adjust the actual enumeration:

---

[3] The Constitution requires that the decennial census be used to apportion representatives "among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. Art. 1 § 2, cl. 3.

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. App., *infra* 6.

Congress also decided that when a census is used for purposes other than apportionment, sampling is permissible:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141.

Under § 141, Congress authorized the Secretary to use sampling and special surveys to collect different types of information which are targeted by the census. As defined by § 141, the census collects information beyond a population count. It inquires into housing matters and related issues and other subjects chosen by the Secretary. 13 U.S.C. § 141(g) ("census of population" defined to mean a census of population, housing and matters related to population and housing); 13 U.S.C. § 141(f) (Secretary shall submit, for

congressional approval, the subjects proposed to be included and the types of information to be compiled in the census).

In this case, the Secretary's decision not to adjust the census complies with the Constitution and with the Census Act. The Secretary conducted the census in "such Manner as [Congress] shall by Law direct" because he complied with § 195's prohibition against adjustment. Congress directs that sampling shall not be used for apportionment purposes and the Secretary did not do so. As a matter of law, the Secretary could not have decided otherwise.

B. The Statutory Text Is Clear; Adjustment Is Prohibited.

The conclusion that Congress prohibits the statistical adjustment of the census for apportionment is consistent with the Constitution, it is consistent with § 141(a), and it is consistent with § 195. The text is clear. The analysis should end. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Id.* at 108; *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993) (Court's task is to give effect to Congress' will and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive). When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). As Justice Holmes emphasized, "We do not inquire what the legislature meant; we ask only what the statute means." *S & E Contractors, Inc. v. United States*, 406

U.S. 1, 14 n. 9 (1972), *quoting* Holmes, *The Theory of Legal Interpretation*, 12 Harv.L.Rev. 417, 419 (1899).

In the debate over adjustment, however, much has been made of a perceived conflict between §§ 141(a) and 195. In order to resolve this supposed conflict and give meaning to both provisions, reviewing courts have reached the strained conclusion that sampling is permissible for apportionment purposes, but not required, and if used, it must be done in conjunction with traditional counting methods. *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980) (Constitution's "actual enumeration" requires that census be at least based on raw data obtained by actual headcount but § 195 permits sampling for apportionment purposes, though it does not require sampling); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), rev'd on other grounds, 642 F.2d 617 (6th Cir. 1981) (§ 195 merely prohibits the use of figures derived solely by statistical techniques; it does not prohibit the use of statistics in addition to traditional measuring tools to arrive at more accurate population count).

In this case, the district court also held that to give effect to both §§ 195 and 141(a), it must be concluded that, in the apportionment area, sampling may be used but only in addition to traditional counting methods. *City of New York v. United States Dept. of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990). The Second Circuit concluded that § 195 actually encourages census adjustment for apportionment purposes. *City of New York*, 34 F.3d at 1125.

The most obvious problem with this application of §§ 141(a) and 195 is that it ignores the clear language of both

statutes. In interpreting a statute a court should always turn first to one cardinal canon before all others. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 1149, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

Section 195 does not say that sampling *may* be used for apportionment or that sampling can be a *part* of the apportionment count.[4] Section 195 clearly states that sampling shall not be utilized to obtain the count which is used for the apportionment of congressional representatives. 13 U.S.C. § 195.

Similarly, § 141(a) does not say that sampling can be used for apportionment. Instead, it provides that sampling can be used with the census. The remaining provisions in §141 direct that the census shall obtain different types of information which are used for different purposes. Sampling may be perfectly appropriate to arrive at a count which

---

[4] It has been concluded that when Congress amended § 195 in 1976, it intended to strengthen the use of sampling where apportionment was not involved and thus substituted "shall" for the word "may." *City of New York*, 34 F.3d at 1125; *Young*, 497 F. Supp. at 1334. Under this analysis, sampling is permissible for apportionment but cannot be a required component of an apportionment count. This analysis ignores that Congress, even when amending, retained the plain prohibition of § 195. Notedly, the Secretary retains discretion in both the original and amended versions of § 195. The original version authorizes sampling when "he deems it appropriate" and the amended version directs sampling "if he considers it feasible." 13 U.S.C.§ 195.

reflects housing, education, income or vocation patterns. When a count is used to apportion representatives, however, sampling is not permitted. 13 U.S.C. § 195.

C. The Legislative History Supports The Conclusion That § 195 Prohibits Adjustment.

Although not necessary to resolve this issue, the legislative history of § 195 supports the conclusion that this section actually means what it says and prohibits the use of sampling for apportionment purposes. When § 195 was first enacted in 1957,[5] the House Report stated:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be affected through a sample survey. Accordingly, except with respect to

---

[5] As originally enacted, § 195 stated: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

> apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.[6] [Emphasis added.]

---

[6] U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, p. 10, 85th Cong. 1st Sess. Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

Rep. Beckworth also entered a statement into the record that recognized the census collects different types of information in addition to a headcount and that sampling may be proper for the collection of this information: "The use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term 'census' implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete basis and that under some circumstances a sample enumeration or a sample census might be substituted for a full census to the advantage of the Government. This section . . . would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so." Hearing, H.R. 7911, 85th Cong., 1st Sess. (June 19, 1957) *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess. (Comm. Print 1980).

The Senate Report also stated that sampling was not permitted for apportionment:

> A third part of section 14 gives the Secretary authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes. The proper use of sampling methods can result in substantial economies in census taking.[7]

When enacted, § 195 prohibited the use of sampling to arrive at a population count for apportionment. When Congress amended § 195 in 1976, it did not substantially change the language of that provision. Most significantly, the 1976 amendment did not remove the reference to apportionment. If Congress originally meant to exclude sampling from apportionment and it left that exclusion in when it amended the statute, then one must conclude that the prohibition remains in force. This conclusion is further supported by the legislative history behind the 1976 amendment to § 195. The focus of the 1976 amendments to the Census Act was to provide for a mid-decade census, *not*

---

[7] S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

to address sampling or adjustment.[8] Section 141(a) was amended to distinguish between the two censuses and:

> New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census.

S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5466.

The 1976 amendment revised § 195 to:

> require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that,

---

[8] "The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment)." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2784 n. 16 (1992). *See also* S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5463, "The Committee . . . to which was referred the bill (S. 3688) to amend title 13, United States Code, to provide for a mid-decade census of population, and for other purposes . . ." *and* the Statement portion of the Senate Report which contains an extensive review of the rationale behind a mid-decade census.

whenever possible, sampling shall be used. [Emphasis added.][9]

The text is clear and the legislative history is clear. Section 195 originally prohibited sampling for apportionment and it still does. Here, the litigation debate between the Executive Branch members and those favoring adjustment has focused primarily on whether the Secretary's administrative decision was constitutionally flawed. Oklahoma, on the other hand, contends adjustment is prohibited and the Secretary had *no* authority to decide other than as he did. The real question should be, if § 195 means what its plain language says, is the statute unconstitutional?

---

[9] S. Rep. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468. Also, in 1980, a bill was introduced which would have specifically amended §§ 141(a) and 195 to "require the bureau of the Census to adjust the population figures, employing the best available methodology to correct for undercounting for all purposes, including reapportionment." S. 3063, 96th Cong., 2d Sess. (1980), 112 Cong. Rec. at S. 22,856 (daily ed. Aug. 25, 1980). The bill was rejected. Statistical adjustment of the census for apportionment purposes was not adopted.

In 1980, a report was prepared by the Congressional Research Service for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess., (Comm. Print 1980), which supports this conclusion. After an extensive analysis of constitutional and statutory provisions and the legislative history of the Census Act and its amendments, the Report concluded that the use of sampling for apportionment purposes is not prohibited by the Constitution but is prohibited by § 195. The Report found that sampling could be used for all other purposes of the decennial census. Report, at p. 88.

If not (because the manner of conducting the census is textually delegated to Congress), then a decision consistent with this plain language should not be subject to challenge.

Finally, even if § 195 can somehow be read to not expressly prohibit a statistical adjustment for apportionment purposes, no basis exists to set aside the Secretary's decision. If, contrary to Oklahoma's reading, Congress has statutorily allowed the Secretary to have this option, the Constitution permits Congress this type of judgment. That being the case, there is no basis to now set aside the Secretary's decision, in the absence of any claim that the Secretary has carried out the census count contrary to the instructions of Congress.

II.

CONGRESS' LEGISLATIVE DECISION REQUIRES JUDICIAL DEFERENCE, FURTHERS THE IMPORTANT GOALS OF POLITICAL STABILITY AND PUBLIC CONFIDENCE AND INVOKES NO JUSTICIABLE STANDARDS.

A. The Statutory Prohibition Against A Census Adjustment Commands Deference From The Judiciary.

The Constitution does not specify the method for the census. Instead, the Constitution explicitly commits to Congress the decision of determining the "manner" in which the census is to be performed. The Constitution expressly directs Congress to use its discretion when exercising this power.

The Constitution also authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. U.S. Const. Art. I, § 8, cl. 18. Once an object is within the authority of Congress, the means by which it will be attained is for Congress to determine. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (it is not for courts to oversee the choice of boundary line in implementing federal statute nor sit in review on size of a particular project area; once the question of public purpose has been decided, the amount of land to be taken and the need for a particular tract to be used in the plan rests in the discretion of the legislative branch).

Within the limits of a constitutional grant, Congress may implement the stated purpose by selecting the policy which in its judgment best effectuates the constitutional aim; this is but a corollary to the grant to Congress of any Article I power. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960) (as James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant").

Congress answered the constitutional directive and decided that sampling should not be used for apportionment purposes. 13 U.S.C. § 195. Congress reviewed the adjustment issue in 1957 and in 1976. Each time, it chose not to allow a statistically estimated adjustment to the census for apportionment purposes. Its good-faith choice of an "actual enumeration" method, practiced for over two hundred years, commands deference from the judiciary. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (Congress' choice of apportionment method upheld; Congress' decision commands far more

deference than a state redistricting plan); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (judging constitutionality of Act of Congress is the gravest and most delicate duty that this Court performs and analysis begins with no less deference than the Court customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Court should afford great weight to decisions of Congress even though legislation implicates fundamental First Amendment or equal protection rights).

B. Congress' Prohibition Against Census Adjustment Furthers Political Stability And Public Confidence.

Congress' decision that the decennial census should not be statistically estimated for apportionment purposes furthers the important goals of political stability and public confidence in government. At the heart of Oklahoma's concern is whether, without a thorough policy debate in Congress, the important limitation contained in § 195 is going to be read out of the statute. If that occurs, even judicial deference to the Secretary's current decision will subject an important national process to the political arena. The process employed for future censuses would be viewed as a politicized one, and the attendant loss of integrity insurmountable. If one administration can make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subjected to partisan argument.

Likewise, if the judiciary should enter the business of managing the census, then both federal and state political processes would be, at best, disrupted, and at worst, halted.

If census adjustment were permissible, then any State which would lose a Representative under the formula adopted by the Census Bureau could find a different formula which arguably produced a "better count." Different formulas could create conflicting decisions among federal courts which would require perpetual resolution by higher courts and, ultimately, this Court. In this case, a decision *not* to adjust produced conflicting decisions involving three circuits: *City of New York*, 34 F. 3d at 1131, *Tucker*, 958 F.2d at 1419, and City of Detroit, 4 F.3d at 1378.

These types of conflicts take years to resolve. This challenge to the methodology of the 1990 decennial census began in 1988. This Court will receive argument in 1996. Over seven years of litigation have elapsed and the issue is not yet resolved. If yet another district court decision and appeal are required, the decennial census will have produced a decennial lawsuit!

These types of cases also involve enormous amounts of complex expert testimony and evidence. In this case, the trial lasted for 13 days, consisted almost exclusively of expert testimony and the transcript exceeded 2,600 pages. One exhibit alone contained over 12,000 documents and 18,000 pages. *City of New York*, 822 F. Supp. at 917. If litigation becomes the method of choosing a census adjustment formula, then the process of seating the government will be placed on hold until the last judicial review occurs. A delayed count or a substituted count becomes a realistic possibility.

The prospect of judicial scrutiny and debate over the choices of census methodology threatens the machinery of government at the national and state levels. The census is an integral part of the ignition system. It is essential and it

must fire on time. If it is missing or if it fires late, then the machinery does not work.

By statute, the census must be completed and the results reported to the President within nine months after April 1st of the year in which the census is performed. 13 U.S.C. § 141(b). The President must notify Congress, within one week of commencement of the first regular session, of the number of representatives to which each State is entitled. 2 U.S.C. § 2a(a). Within fifteen days of the President's notification, the Clerk of the House of Representatives must send this information to the Governor of each State. 2 U.S.C. § 2a(b). If the count is delayed, then these events will not occur within the statutory timetable. As long as there is no final count, districts within States cannot be drawn and representatives cannot be elected.

A delayed census puts the entire process on hold. Neither the Constitution nor the statutes anticipate that a census count may be held up while the judiciary reviews or replaces an adjustment formula. There is no statutory or constitutional procedure to use in the interim. Political stability and public confidence are lost when government is halted because it cannot determine even its own composition.

A cornerstone of our constitutional system of government is the ability to convene a properly constituted and recognized government in a timely manner without protracted constitutional challenges over reapportionment and the redistricting process. In Oklahoma, the transfer of state political power is keyed to the decennial census. Oklahoma is bound by its state Constitution to use the census to draw its congressional districts. The state Constitution also demands that redistricting be completed quickly: within ninety (90) days after the convening of the first regular

session of the state legislature following the federal decennial census. Okla. Const. art. V, § 11A.

Developing a state redistricting plan is a monumental task. In Oklahoma, it encompasses districts for 101 state representatives, 48 state senators and 6 Congressmen. Jt. App. at 103.[10] After legislative boundary lines are drawn, county commissioners in each of Oklahoma's 77 counties must redraw their district boundaries. Each county must also redraw its precincts. It requires extensive commitments of time, resources and money. Oklahoma spent over $1 million on its 1991 redistricting alone. Jt. App. at 105.

It is also unclear how a repeat run would occur. Oklahoma's Constitution did not anticipate that the federal decennial census might result in two counts or in a delayed count. The state Constitution does not provide for a procedure for a retake and it is not even clear who would perform the second round of redistricting. The Oklahoma Constitution states that an Apportionment Commission shall be created if the legislature fails to make the required apportionment within the time provided. Okla. Const. art. V, § 11A. Resolution of whether a three person committee or the legislature should redistrict would undoubtedly create debate and litigation and would not be conducive to political stability or public confidence in government.

Political stability at both the federal and state level is obviously a vital concern. It is also a concern that is directly impacted by census adjustment. Congress' decision

---

[10]References to "Jt. App." are to the joint appendix filed in this appeal.

not to adjust the census solves the problem because it allows the legislative branch to change its composition without delaying or halting the business of government.

C. No Justiciable Standards Exist For Reviewing The Census.

The analysis of whether an issue presents a claim that can be resolved by justiciable standards is often made in the context of the political question doctrine. The Court rejected that doctrine in a case which concerned Congress' selection of apportionment methods. *Montana*, 112 S. Ct. at 1430. Although it is now questionable whether the doctrine could be applied here to say the conduct of the census presents a non-justiciable question in the constitutional sense,[11] an analogy can clearly be drawn between elements of the doctrine and this case. This analogy leads to the conclusion

---

[11] *See Nixon v. United States*, 113 S. Ct. 732 (1993) (claim that Senate rule violated Impeachment Trial Clause was nonjusticiable; the word "try" in that clause does not provide an identifiable textual limit on the authority committed to the Senate); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (Court found no justiciable claim; where Constitution gives Congress the power to prescribe military training, judiciary should not undertake to review a wide range of possible procedures; such a review would be inappropriate even in the unlikely event that the judge possesses the requisite technical competence to do it).

In this case, as in *Nixon*, there is no constitutional or statutory text under which to resolve the issue and assess census methodology. The phrase, "in such manner as [Congress] by law shall direct" does not provide a sufficient textual basis to create a justiciable standard.

that courts should not manage the business of taking the census.[12]

Here, the Constitution's explicit textual language, unaccompanied by any restrictions, makes clear that the "manner" of conducting the census is committed to Congress. By virtue of this language, "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982).

Neither the statutes nor the Constitution speak to the issue of standards. As recognized by the Seventh Circuit Court of Appeals:

---

[12] Under the political question doctrine, judicial review should be declined where there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Montana, 112 S. Ct. at 1424, *citing Baker v. Carr*, 369 U.S. 186 (1962).

> The plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount.

Tucker, 958 F. 2d at 1418.

In the trial of this case, the district court was asked to review an enormously complex adjustment proposal but with no legal standards to use to judge it. This proposal: (1) created 1,392 poststrata on the basis of age, sex, race, Hispanic origin, housing tenure, the type of place and geographic location; (2) utilized a "homogeneity assumption" that persons in each poststratum were homogeneous with respect to the probability of being missed by the census; (3) identified 5,000 blocks which fairly represented these poststrata; (4) calculated 1,392 poststratum raw adjustment factors to reflect variations found in the Post-Enumeration Survey ("PES") conducted within these 5,000 blocks; (5) "smoothed" the 1,392 raw factors by both "modelling" and "regression" exercises; and (6) used a mathematical model to impute missing characteristics in order to match the census record to the PES to determine whether an undercount occurred. The accuracy of the adjusted count was checked against a Demographic Analysis ("DA") which estimated population and subpopulations through administrative records such as birth and death certificates and immigration statistics. *City of New York*, 822 F. Supp. at 915-16, 921, 923.

There are no justiciable standards which the district court could have used to decide whether the proposed 1,392 "smoothed," "modelled" and "regressed" adjustment factors are the best factors to use. There are no legal standards by which to gauge imputation and undercount ratios or the variance of the PES from the DA. There are no standards and no law to apply to a given formula to determine whether it is required or even permissible.

The power to exercise discretion to decide census methodology is clearly committed to the Congress, not the judiciary. A court's independent decision on this question would ignore Congress' right to direct the census process and demonstrate a lack of respect for that branch of government. Regardless of one's interpretation of 13 U.S.C. § 195, the policy for the past two hundred years has been to use an actual count and *not* to statistically adjust the census.

Finally, adjustments beget adjustments. If left to judicial review, this issue could result in different courts choosing different paths for one census, in the quest for greater accuracy. The lack of identifiable standards almost guarantees that not all courts would take the same side in a dispute among census officials, statisticians and demographers.

III.

CENSUS ADJUSTMENT IS NOT REQUIRED BY EITHER THE CONSTITUTION OR THE GOAL OF VOTER EQUALITY.

Nothing in the Constitution requires that Congress adjust the census. In this case, there is no allegation that intentional discrimination against a protected class caused the census undercount. Those in favor of adjustment may contend that the Constitution creates a right of census accuracy or that adjustment is required under the one-person-one-vote standard announced by this Court in prior cases. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983). Neither the Constitution nor voter equality compels statistical adjustment of the census.

The Constitution's text does not address census accuracy. It does not require a specific level or type of accuracy and it does not specify the means to obtain a census count, accurate or otherwise.

As held in *Montana*, the one-person-one-vote standard does not provide the means to resolve all issues in this area: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Montana*, 112 S. Ct. at 1429. This Court recognized in *Montana* that the goal of absolute mathematical equality is illusory under the constraints imposed by the Constitution. The constitutional guarantee of a minimum of one Representative for each State and the need to allocate a fixed number of Representatives among 50 States of different populations make absolute voting equality impossible. *Id.* at 1429.

Neither the Constitution nor the goal of voter equality provides a standard by which a court can choose a particular formula to adjust the census. Neither source gives guidance as to whether 5,000 blocks or 10,000 blocks should be used or where those blocks should be located or whether 1,392 strata are sufficiently homogeneous to support an adjustment formula. Neither source determines whether it is best to have a final count which is more accurate from the standpoint of total numbers but is less accurate with respect to distributing those numbers across the United States.

In this case, the Secretary's decision not to adjust was based, in part, on his conclusion that there was "little or no evidence that the adjusted counts led to greater distributive accuracy at local levels." *City of New York*, 822 F. Supp. at 922. There are no standards under which a court could decide whether total number accuracy or distributive accuracy is required by the law.

Neither the Constitution nor the goal of voter equality determines whether it is best to leave real people in the count or remove them and replace them with a "best guess." The adjustment formula proposed in this case would delete actual people and replace them with an adjusted number. *Id.* at 922, n. 21. The deletion of real people from the final count could undermine the public's willingness to respond to the census. If one is going to be replaced by a "best guess" then one may not take the time to send in the form. It may also diminish the incentive of local governments to make efforts to increase census participation. A State may instead choose to concentrate on lobbying for a particular adjustment formula. Neither of these results lead to a more accurate census.

IV.

THE FINAL RESULT REACHED BY THE SIXTH AND SEVENTH CIRCUITS IS CORRECT.

The Second Circuit Court of Appeal's decision conflicts with the rulings of the Sixth and Seventh Circuits which upheld the Secretary's decision not to adjust the 1990 census. *City of Detroit*, 4 F.3d at 1378; *Tucker*, 958 F.2d at 1419. The latter decisions did not address § 195. Nevertheless, the Sixth and Seventh Circuits reached the correct result. Oklahoma was not a party to these cases.

Both the Sixth and Seventh Circuits recognized that the apportionment clause does not create a constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375; *Tucker*, 958 F.2d at 1417. The Seventh Circuit reasoned:

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights.

Tucker, 958 F.2d at 1417.

A court could properly review a claim that Congress did not conduct the census, or did not do so in good faith or intentionally reduced some group's representation. Judicial review of census methodology, however, is not authorized

by the Constitution. *City of Detroit*, 4 F. 3d at 1376. A court cannot provide a remedy for a census undercount which is unintentional and is "merely an accident of the census-taking process." *Tucker*, 958 F.2d at 1413. Judicial review is also improper because the claim of one State or city cannot be considered in isolation. The consequences for other States and cities must be weighed. *City of Detroit*, 4 F.3d at 1378.

The Sixth and Seventh Circuits rejected the same claim that the Second Circuit found to merit heightened scrutiny. The Sixth and Seventh Circuits reached the correct result. The conflict among the circuits should be resolved by this Court.

V.

THE COURT OF APPEALS ERRED WHEN IT IMPOSED A STANDARD OF REVIEW OTHER THAN ARBITRARY AND CAPRICIOUS.

If one assumes the Secretary is lawfully permitted the choice of utilizing statistical estimates for apportionment purposes, then it is clear that his decision is not subject to the heightened scrutiny imposed by the Second Circuit. The Administrative Procedures Act ("APA") sets out the required scope of review of agency decisions. The APA provides:

> . . . The reviewing court shall --
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; . . .

5 U.S.C. § 706.

The district court reviewed the Secretary's decision in accordance with the mandate of the APA and determined that "the Secretary's decision not to adjust the 1990 census count was neither arbitrary nor capricious." *City of New York*, 822 F. Supp. at 929. On appeal, the plaintiffs argued that the refusal to adjust the census violated the apportionment clause of the Constitution and, therefore, the district court should have imposed a *de novo* standard of review.

The Court of Appeals rejected the plaintiffs' plea for *de novo* review. The court, however, did impose a heightened scrutiny, ruling that the agency's decision (1) had to further a legitimate governmental objective and (2) be essential for the achievement of that objective. The decision of the Court of Appeals was based on the premise that the Secretary's decision not to adjust the census involved violations of the Apportionment Clause and the Fourteenth Amendment.

The flaws in the Second Circuit's opinion, however, are that (1) this is not a case involving apportionment and (2) the agency decision does not involve State action. Because the case does not involve violation of constitutional rights, the scope of review is limited to whether the agency decision was arbitrary or capricious.

The Second Circuit relied on the disproportionment undercount of racial minorities to justify heightened scrutiny. *City of New York*, 34 F. 3d at 1129. The Second Circuit was wrong. It was wrong because the performance of the census involved no intentional conduct to reduce the count of minority residents. The law does not hold that an "official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (emphasis in original). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). If there is proof that a discriminatory purpose was a motivating factor behind the official act in question, then "judicial deference is no longer justified." *Village of Arlington Heights*, 429 U.S. at 266.

In this case, there is no allegation that the Secretary intended to undercount minorities. It is also undisputed that the census cannot achieve an exact count of the nation's population. There is no basis upon which to support a heightened review of the Secretary's decision not adjust the census.

The Second Circuit attempted to avoid the requirement of intentional discrimination by analogizing this case to *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry*, 376 U.S. at 8; and *Reynolds v. Sims*, 377 U.S. 533 (1964). Each of these cases, however, dealt with apportionment or districting schemes within a particular State.

As recognized by the Second Circuit:

> There are, of course, differences between the present case and the *Wesberry/Reynolds v. Sims* line of cases because the present case focuses not on action by a state within its boundaries but rather on federal action that is nationwide in scope.

City of New York, 34 F.3d at 1129.

The *Wesberry* one-person-one-vote standard addresses the division of one fixed number by another fixed number. The population of the state is divided by the number of congressional representatives allowed to that state. This equation is easily solved and it readily provides a concrete number that can be used to measure the accuracy of the districting plan.

This case, however, concerns counting not solving an equation for an answer. There is a major conceptual difference between the two problems. In reviewing the Secretary's decision not to adjust the census, there is no equation and there is no resulting number to provide guidance. This case cannot be analyzed in the same manner as the apportionment cases.

The Seventh Circuit Court of Appeals, in *Tucker*, also rejected the claim that the refusal to adjust should be reviewed under the same standard as apportionment and voting rights cases:

> The plaintiffs cannot be serious in arguing that the refusal to adjust the headcount violates the Voting Rights Act. That Act

> provides remedies only against "any State or political subdivision" of a state. 42 U.S.C. § 1973; and see §§ 1973a to 1973dd-5. The Fourteenth Amendment is likewise limited to state action. The plaintiffs' invocation of these enactments is a throwaway.

Tucker, 958 F.2d at 1414.

The court also analyzed the plaintiffs' argument that failure to adjust the census violated the apportionment clause. The court again distinguished *Wesberry*, *Reynolds* and other cases relied on by the plaintiffs and found:

> The plaintiffs' main argument, however, is different from any we have mentioned. It is derived from a constitutional right neither to equal voting power nor to freedom from governmental discrimination, but to census accuracy.

Id. at 1415.

There is no constitutional right to census accuracy. Thus, the decision not to adjust the census did not violate the Constitution. The standard of review then must be whether the Census Bureau's decision not to adjust was arbitrary and capricious. The Court of Appeals erred in imposing a burden of heightened scrutiny.

CONCLUSION

The State of Oklahoma respectfully requests that the Second Circuit Court of Appeals' decision be reversed and

that the Secretary's decision not to adjust the 1990 census be upheld.

Respectfully submitted,

DON G. HOLLADAY
Counsel of Record
Shelia D. Tims
Andrews Davis Legg Bixler
Milsten & Price
500 West Main
Oklahoma City, OK 73102
(405) 272-9241

Attorneys for Petitioner,
State of Oklahoma

November 9, 1995

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> * * * * *
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration

> shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> **Section 8**. The Congress shall have Power
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> **Section 2**. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or

the members of the Legislature thereof, is denied to any one of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. § 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each

State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall

be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. § 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a

decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 13 U.S.C. § 195 provides:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

* * * * *